

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:2:POSTF-165444-01
VATaverna

date: 12/6/2001

to: Richard Fleming, Territory Manager, Technology,
Communication and Media
Attn: Revenue Agent William Wise

from: Area Counsel, LMSB (Financial Services)

subject:

Form 872 - Tax Years [REDACTED], [REDACTED]

**Consent to Extend the Statute of Limitations on Assessment
Statute of Limitations Expires: [REDACTED]**

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-17

This memorandum responds to your request of December 3, 2001. By memorandum dated November 3, 2000, this office provided you with advice regarding the appropriate language to use on Form 872 (Consent to Extend the Time to Assess Tax) to extend the statute of limitations on assessment of tax of [REDACTED] for the [REDACTED] taxable year. Subsequent to the execution of the Forms 872, [REDACTED] merged with a limited liability company. Accordingly, you have requested that we provide you with advice on the proper entity to execute Forms 872 to extend the statute of limitations on assessment of tax of [REDACTED] for the taxable years [REDACTED] and [REDACTED]. You also requested our advice on the appropriate language to use on the Form 872. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice. This memorandum should not be cited as precedent.

Issues

1. Which entity is the proper entity to execute Forms 872 for [REDACTED] and its subsidiaries, for the taxable years ending June 30, [REDACTED] and June 30, [REDACTED]?
2. What specific language should be used on the Forms 872?

Conclusion

1. [REDACTED] (now [REDACTED]) is the proper party to execute the Form 872 relating to [REDACTED]'s [REDACTED] and [REDACTED] income tax liabilities.

2. The caption of the Forms 872 extending the statute of limitations for [REDACTED] and its subsidiaries for the pre-merger tax years should read as follows:

"[REDACTED] (EIN [REDACTED]) formerly [REDACTED], formerly [REDACTED]."

Facts

For the taxable years ending June 30, [REDACTED] and June 30, [REDACTED] ("pre-merger tax years"), [REDACTED] ("[REDACTED]") (EIN [REDACTED]), a Delaware corporation, was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. You are presently conducting an examination of [REDACTED] and its subsidiaries for the pre-merger tax years.

[REDACTED] ("[REDACTED]") is a Delaware corporation. [REDACTED] is wholly-owned by [REDACTED] ("[REDACTED]"), a Delaware corporation. On [REDACTED], [REDACTED], [REDACTED], and [REDACTED] entered into an Agreement and Plan of Merger ("Agreement").

As a result of the Agreement, [REDACTED] became the wholly-owned subsidiary of [REDACTED]. In addition, [REDACTED], which was created solely for the purpose of acquiring [REDACTED], was merged out of existence.

On [REDACTED], [REDACTED] filed a Certificate of Ownership and Merger with the Office of the Secretary of State for the State of Delaware, merging [REDACTED] and [REDACTED] into [REDACTED] under the name "[REDACTED]" ("[REDACTED]").

On [REDACTED], [REDACTED] LLC ("[REDACTED]"), a Delaware limited liability company, merged with and into [REDACTED]. According to the Certificate of Merger, [REDACTED] was the surviving corporation under the name "[REDACTED]" (EIN [REDACTED]).

Discussion

1. Which entity is the proper entity to execute Forms 872 for [REDACTED] and its subsidiaries, for the pre-merger tax years?

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment for income tax can be found in the consolidated return regulations. Treas. Regs. §1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. §1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having been given or executed by each such subsidiary. Treas. Reg. §1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. §1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. §1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

In the instant case, the Agreement provides that [REDACTED] survived the merger between [REDACTED] and [REDACTED] under the name "[REDACTED]" [REDACTED] survived the merger between [REDACTED] and [REDACTED] under the name "[REDACTED]". Therefore, [REDACTED] (now [REDACTED]) is the proper party to execute the Form 872 relating to [REDACTED]'s [REDACTED] and [REDACTED] income tax liabilities.

2. What specific language should be used on the Forms 872?

The caption of the Forms 872 extending the statute of limitations for [REDACTED] and its subsidiaries for the pre-merger tax years should read as follows:

"[REDACTED] (EIN [REDACTED])
formerly [REDACTED], formerly [REDACTED]
[REDACTED]"

The EIN of [REDACTED] (EIN [REDACTED]) should be entered in the upper right hand corner of the Form 872.

Procedural Considerations

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time. To satisfy this requirement, you should provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the consent. You should also document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective statute of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Should you have any questions regarding this matter, please contact Viviana Taverna of this office at (212) 436-1508.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel, LMSB
(Financial Services)

By: _____
VIVIANA TAVERNA
Attorney (LMSB)